Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

LOWELL BOYD THACKER,

Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Doing business as Southern
Pacific Transportation Company,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by this case is:

1. Does the Railway Labor Act (RLA), 45 U.S.C. §§151 et seq. immunize a railroad from liability for the negligent infliction of physical injury upon its employee, a non-signatory to the collective bargaining agreement, where the employee is physically injured while attending a mandatory disciplinary hearing on the railroad's property?

The Eighth Circuit's decision answered the question in the affirmative finding employee's negligence claims[1] brought under The Federal Employer's Liability Act (FELA), 45 U.S.C. §51 et seq. were minor disputes involving interpretation of the collective bargaining agreement and were therefore preempted by the Railway Labor Act (RLA). Because this case implicates significant issues of federal railroad law and the uniformity in its application that are of national concern and because the Eighth Circuit's holding conflicts with precedent from this Court, from other Circuit Courts of Appeal that have considered the issues involved and even among decisions within the Eighth Circuit, claimant respectfully submits that *certiorari* should be granted. See *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1964); *Coppinger v. Metro-North*

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[1] Plaintiff's Complaint also contained negligent and intentional infliction of emotional distress claims.

QUESTION PRESENTED – Continued

Commuter Railroad, 861 F.2d 33, 35 (2d Cir. 1988); *Hirras v. National Railroad Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995); *Saridakis v. United Airlines*, 166 F.3d 1272, 1278 (9th Cir. 1999).

STATEMENT OF INVOLVED PARTIES

Petitioner, Lowell Boyd Thacker, is an individual. Respondent, St. Louis Southwestern Railway Company has merged into The Union Pacific Railroad Corporation, a wholly-owned subsidiary of Union Pacific Corporation, a publicly held corporation.

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The opinion of the Eighth Circuit, No. 00-2373, is reported at 257 F.3d 922.

STATEMENT OF JURISDICTION

The United States Court of Appeals opinion and judgment was entered on July 31, 2001. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the Court of Appeals was founded on 28 U.S.C. §1291. The jurisdiction of the district court was based on 28 U.S.C. §1331.

STATUTORY PROVISIONS INVOLVED.

Federal Employers' Liability Act, 45 U.S.C.

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employees defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her

personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Railway Labor Act, 45 U.S.C. §151 et seq.

§151a. General Purposes.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay,

rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§153. National Railroad Adjustment Board (See Appendix. App. 33)

STATEMENT OF THE CASE

Petitioner Lowell Thacker's Complaint,[2] filed in the Eastern District of Missouri, alleged negligence and intentional infliction of emotional distress pursuant to the Federal Employers' Liability Act, 45 U.S.C. §51 et seq. (App. 23).

Count I was directed at an injury to Thacker's right thumb sustained by falling on a bolt, while performing his employment duties on July 23, 1992. Thacker alleged Respondent, his employer, St. Louis Southwestern Railway Company, was negligent and sought damages for his losses.

Thacker was not able to return to work. In 1998, Southwestern Railway summoned him to a disciplinary hearing 80 miles from his home, for allegedly failing to submit a medical update form by March 9, 1998, which

[2] The original complaint was amended twice and it is the Second Amended Complaint that was in effect at all times relevant to the issues presented herein.

had been sent out on February 26, 1998.[3] Respondent had received previous medical updates stating Plaintiff was unable to work permanently but despite this and the fact that it knew the information requested had been submitted to the physician and was being forwarded to it, the railroad insisted on conducting the hearing at the originally scheduled time.

On March 20, 1998 Thacker traveled to Southwestern Railway's offices for the hearing. He was upset and not feeling well. During the hearing he vomited. He left the room unaccompanied and went to the restroom, where he passed out, fell to the floor and suffered injuries to his back and neck. This is the subject of Count II of the Complaint.

The district court granted Respondent's Motion to Dismiss Count II, finding the Railway Labor Act, 45 U.S.C. §151 et seq. "preempted" the claims under Count II. Count I was twice tried by jury. The first trial ended in a hung jury. The second trial resulted in a jury verdict in favor of Thacker, but with a finding of fifty percent (50%) contributory negligence. The amount of the damages awarded to Thacker was $10,658.25. (App. 8-11)

On July 31, 2001 the Eighth Circuit Court of Appeals affirmed the district court's decision that Thacker's FELA claims in Count II were preempted by the RLA because

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[3] Plaintiff's attorney had in fact explained to one of Defendant's attorneys at a deposition in another case prior to this hearing that Plaintiff was not able to return the form by the date the railroad set because it had not been received in sufficient time to forward it to the physician and then return it to the railroad.

they related to Southwestern Railway's scheduling decisions regarding the hearing and thus were "minor disputes" involving the interpretation of the CBA, subject to arbitration under the Railway Labor Act. (App. 1).

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

First, the Eighth Circuit, in ruling that the RLA preempted Thacker's FELA negligence claim, failed to examine the purposes of the FELA and the RLA and give effect to both. The Court's decision directly conflicts with *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 564 (1987) and also impermissibly extinguishes a judicial remedy created by the FELA, 45 U.S.C. §51.

The Eighth Circuit reached its decision that the RLA preempts Thacker's FELA claim without first applying the mandatory test of examining the purposes of each statute and then harmonizing the two federal statutory schemes. Instead, the Court of Appeals inexplicably presumed the RLA and FELA were incompatible and summarily concluded that Thacker's claims were "minor disputes" because they "pertained to the Railroad's scheduling decisions for the disciplinary hearing" (App. 4-5) and were therefore preempted by the RLA. In so finding, the Eighth Circuit completely ignored the requirement that when two federal statutes are capable of being harmonized it is the duty of the courts to give effect to both, absent a clear Congressional intent to the contrary. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

The FELA and the RLA have been declared compatible. This Honorable Court in *Buell* held, "The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages." 480 U.S. at 564.

Congress did not intend that a railroad worker who suffered a physical injury "would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." *Buell*, 480 U.S. at 564. Thus, a plaintiff's right to pursue a FELA claim to recover damages for physical injuries sustained is not effected by the RLA. *Buell*, 480 U.S. at 566. The RLA does not provide a remedy for a physical injury caused by an employer's negligence and a railroad employee's only remedy for negligence against his employer comes from the FELA. No authority exists for providing railroads with immunity from liability for negligence simply because the RLA provides for arbitration of labor disputes. To so hold, as the Eighth Circuit has done, defeats the primary purpose of the FELA, which is to facilitate recovery for railroad workers who suffer personal injuries due to the negligence of their employers. *Buell*, 480 U.S. at 561.

Second, the Eighth Circuit's characterization of plaintiff's claim as a "minor dispute" conflicts with the analysis set forth in *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) for determining whether a dispute is minor or major for preemption purposes. *Hawaiian Airlines* holds that the RLA preempts state law claims that can be conclusively resolved by interpreting a collective bargaining

agreement (minor disputes) but will not preempt state law claims where the rights and obligations are independent of the collective bargaining agreement. 512 U.S. at 255. Since the FELA is the source of Thacker's rights, and not the collective bargaining agreement, the Eighth Circuit's determination that his claim was a minor dispute is in direct conflict with this Court's decision.

Additionally, Thacker's negligence claim cannot be conclusively resolved by interpreting the collective bargaining agreement. The agreement only provides that before disciplinary action is taken a hearing shall be held. It does not provide under what conditions such a hearing may or may not be held. (App. 29-30) Nor does it afford any remedy for a claim of physical injury. (App. 29-30) Thacker's dispute does not involve the meaning of the collective bargaining agreement. The fact that it is mentioned does not extinguish a right from an independent source. *Livados v. Bradshaw*, 512 U.S. 107 (1994).

Third, the Eighth Circuit's decision also aggravates a split of authority in decisions from other Circuit Courts of Appeals as to whether claims based on rights arising from independent statutes or common law are minor disputes and thus precluded by the RLA. The circuits are divided and inconsistent in their decisions on when the RLA preempts or supersedes other claims. In accord with the United States Supreme Court are the Second Circuit, *Coppinger v. Metro-North Commuter Railroad*, 861 F.2d 33, 35 (2d Cir. 1988) [§1983 claim not preempted by RLA]; Fifth Circuit, *Hirras v. National Railroad Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995) [Title VII claim not preempted by RLA]; and the Ninth Circuit, *Saridakis v. United Airlines*,

166 F.3d 1272, 1278 (9th Cir. 1999) [ADA claim not preempted by RLA]. In opposition are the Seventh Circuit decisions in *Bielicke v. Terminal Railroad Association*, 30 F.3d 877, 878 (7th Cir. 1994) [FELA claim preempted by RLA] and *Monroe v. Missouri Pacific Railroad Company*, 115 F.3d 514 (7th Cir. 1997) [FELA claim preempted by RLA].

Furthermore, the decision in this case conflicts with other decisions within the Eighth Circuit itself. In *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995), the court found the RLA did not preempt the plaintiff's ADA claim because the plaintiff was seeking to "enforce a federal statutory right, not a contractual right." Also see: *Meyer v. Schnucks Markets, Inc.*, 163 F.3d 1048 (8th Cir. 1998) [slander and tortious interference with business claims not preempted because they were not based on or dependent upon an interpretation of a particular provision of the CBA]. However, in *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989) and *Gore v. Trans World Airlines*, 210 F.3d 944 (8th Cir. 2000), the Court found slander claims were preempted.

The decision in this case has exacerbated a growing non-uniformity and unpredictability in federal railroad law, which is a matter of significant national concern. Whether a railroad worker has a right to recover damages for physical injury caused by his employer's negligence is a matter that must be determined by the FELA and case law interpreting what injuries are recoverable, not what geographic location a lawsuit is filed in.

Even within the Eighth Circuit, consistency in preemption issue decisions is lacking. The Eighth Circuit, recognizing the conflicts within its own circuit has relied

on the principle that it is free to choose, whichever line of cases it wishes to follow. *Graham v. Contract Transportation, Inc.*, 220 F.3d 910, 914 (8th Cir. 2000). This presents an intolerable situation.

Railroad workers filing FELA negligence causes of action within the Eighth Circuit no longer have a right granted by the FELA if their physical injuries occur at disciplinary hearings, while in other circuits they continue to have that right. This situation requires resolution by this Honorable Court.

CONCLUSION

The petition for writ of *certiorari* should be granted in this case to maintain the uniformity of federal law previously established by this Court and to resolve the conflict between circuits in an issue of significant national interest.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2373

Lowell Boyd Thacker, Appellant, v. St. Louis Southwestern Railway Company, doing business as Southern Pacific Transportation Company, Appellee.	*	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: March 16, 2001

Filed: July 31, 2001

Before HANSEN and HEANEY, Circuit Judges, and Fenner,[1] District Judge.

[1] The Honorable Gary A. Fenner, United States District Judge, for the Western District of Missouri, sitting by designation.

HEANEY, Circuit Judge.

Lowell Boyd Thacker appeals the district court's[2] dismissal of Count II of his Federal Employer's Liability Act (FELA) complaint, arguing that it is not preempted by the Railway Labor Act (RLA). Because Thacker's claims within Count II are "minor disputes" within the purview of the RLA, we affirm.[3]

I. Background

Thacker began working for the St. Louis Southwestern Railway Company ("Railroad") in 1969, and worked there until he was dismissed in March, 1998. During the period relevant to this appeal he worked as a porter, which involved the general cleaning of offices and replenishing of supplies. He had an excellent work record. On July 23, 1992, Thacker slipped on a bolt and injured his right thumb while at work. He remained an employee of the Railroad while he received treatment for his thumb injury, but he never returned to work.

On August 13, 1997, Thacker was instructed to attend a medical examination and drug screening to determine his fitness for duty, but he failed to do so. The Railroad arranged for an investigative hearing regarding this matter on September 11, 1997, which Thacker also failed to attend. The Railroad assessed a level 2 disciplinary penalty against him for noncompliance with its requests.

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[2] The Honorable John F. Forster, Jr., United States Magistrate Judge for the Eastern District of Arkansas.

[3] We do not reach Thacker's other issues on appeal because they are without merit.

On February 26, 1998, the Railroad instructed Thacker to provide updated medical documentation regarding his thumb condition no later than March 9, 1998, or risk further disciplinary action. He requested additional time to submit medical records, and mistakenly believed that he had been granted an extension. He failed to meet the March 9 deadline. On March 20, 1998, the Railroad held a disciplinary hearing regarding Thacker's failure to provide the requested information on time. The Railroad assessed Thacker a disciplinary penalty of level 5, resulting in his permanent dismissal. At the March 20 hearing Thacker became nauseated, fell, and injured his back and neck while moving to the restroom to vomit.

Thacker brought a negligence claim against the Railroad under the FELA in district court. In his second amended complaint Thacker alleged in Count I that the Railroad was negligent for failing to prevent Thacker's thumb injury. Count II alleged that the Railroad was negligent for 1) demanding that Thacker return to Railroad property for the disciplinary hearing when the Railroad previously had failed to provide a safe place for Thacker to work; and 2) requiring him to travel eighty miles to attend the hearing, constituting extreme and outrageous conduct done with the intent to cause Thacker to suffer severe emotional distress. The court granted the Railroad's motion to dismiss Count II because it found that the claim was preempted by the RLA, 45 U.S.C. §§ 151 *et seq.*

Count I was tried before a jury on two occasions in 2000. The first trial ended in mistrial because the jury could not reach a verdict. The second trial resulted in a

verdict for the plaintiff with a finding of fifty percent contributory negligence, providing the plaintiff with damages in the amount of $10,658.25. The district court denied plaintiff's motions for judgment notwithstanding the verdict and for a new trial.

II. Analysis

We review the district court's preemption decision with respect to Count II *de novo*. *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269, 272 (8th Cir. 1994). Thacker asserts that his negligence claim arising from the disciplinary hearing requires a factual inquiry into the Railroad's motives and Thacker's conduct, issues that are not governed by the collective bargaining agreement (CBA) and not preempted by the RLA. The Railroad argues in response that the Railroad's scheduling of the disciplinary hearing is governed by the CBA, requiring binding arbitration before the National Railroad Adjustment Board (NRAB).

In Count II Thacker alleges that the Railroad failed to provide a safe place to work at the disciplinary hearing because it scheduled the hearing on railroad property, far from Thacker's home, knowing that being on Railroad property presented a danger to Thacker. None of Thacker's Count II allegations relate to the physical condition of the premises and the danger they posed to Thacker. Instead, they pertain to the Railroad's scheduling decisions for the disciplinary hearing. Accordingly, Thacker's complaints are "minor disputes" involving the interpretation of the CBA and are subject to arbitration

under the RLA. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994).

Because the propriety of the disciplinary hearing is a minor dispute subject to arbitration under the RLA, we affirm the district court.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LOWELL BOYD THACKER

Plaintiff

v. 5:96CV00760 JFF

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY, d/b/a
SOUTHERN PACIFIC
TRANSPORTATION COMPANY,

Defendant

ORDER

(Filed May 4, 2000)

Plaintiff has filed a Motion for Judgment Notwithstanding the Verdict, or in the alternative, a Motion for New Trial. In support of his motion, plaintiff argues that (1) the court failed to recognize and properly respond to his *Batson* challenge raised during jury selection; (2) that the jury was not allowed to include overtime payment denied to plaintiff when computing his total wage loss; (3) that the jury was not allowed to consider the fact that plaintiff attempted to bid out of the job he was performing; (4) that the jury verdict does not reflect compensation to plaintiff for his pain and suffering experienced; (5) that the jury was not allowed to hear rebuttal testimony of Carolyn Thacker regarding plaintiff's injuries since the date of his injury; (6) and that the jury was not allowed to consider plaintiff's back injury received in a separate incident. (Docket entry number 83) Defendant filed a

response in opposition to plaintiff's motion. (Docket entry number 84)

After carefully considering plaintiff's arguments, plaintiff's motion is denied.

IT IS SO ORDERED.

DATED this 2d day of May, 2000.

/s/ John F. Forster, Jr.
UNITED STATES MAGISTRATE JUDGE

United States District Court
Eastern District of Arkansas

LOWELL BOYD THACKER	JUDGMENT IN A CIVIL CASE
v.	CASE NUMBER: 5:96cv760
ST. LOUIS SOUTHWESTERN RAILWAY d/b/a Southern Pacific Transportation Co.	(Filed April 11, 2000)

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff, Lowell Boyd Thacker, have and recover of and from the defendant, St. Louis Southwestern Railway d/b/a Southern Pacific Transportation Co., the sum of $21,316.50 compensatory damages on the claim of violation of FELA.

IT IS FURTHER ORDERED AND ADJUDGED that this judgment is reduced by the amount of plaintiff's negligence which the jury assessed as fifty percent (50%); therefore, the plaintiff shall recover a total of $10,658.25 with interest on all verdicts at the rate of 6.197% per annum from the date of judgment.

10 April 2000
Date

JAMES W. MCCORMACK
Clerk

/s/ Cecilia Norwood
(*By*) *Deputy Clerk*

JURY VERDICT FORM

Note to Jury: *Complete this form by writing in the name required by your verdict.*

On the claim of plaintiff, LOWELL BOYD THACKER, against defendant, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, doing business as SOUTHERN PACIFIC TRANSPORTATION COMPANY, we the jury find in favor of:

Lowell Boyd Thacker

Plaintiff OR Defendant

(Lowell Boyd Thacker) (Southwestern Railway Company)

Note to Jury: *Complete the next paragraph ONLY IF the above finding is in favor of the plaintiff.*

We, the jury, assess the total damages of plaintiff at $21,316.50

Note to Jury: ***DO NOT REDUCE THIS AMOUNT BY THE PERCENTAGE OF NEGLIGENCE, IF ANY, YOU FIND IN THE NEXT QUESTION.***

We, the jury, find plaintiff, LOWELL BOYD THACKER, to be 50% negligent.

/s/ Laura C. Clark
Signature of Foreperson

FILE COPY

UNITED STATES DISTRICT COURT
Eastern District Of Arkansas
U.S. Post Office & Court House
600 West Capitol, Suite 402
Little Rock, Arkansas 72201-3325

April 12, 2000

* * MAILING CERTIFICATE OF CLERK * *

RE: 5:96-cv-00760.

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BY: /s/ E. [Illegible]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LOWELL BOYD THACKER — Plaintiff

v. 5:96CV00760 JFF

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, d/b/a SOUTHERN PACIFIC TRANSPORTATION COMPANY, — Defendant

ORDER

(Filed Feb. 24, 2000)

Before the Court is plaintiff's motion to reconsider, (docket entry number 58), plaintiff's motion in limine, (docket entry number 56), and defendant's motion in limine, (docket entry number 63).

Motion to Reconsider

After careful review of plaintiff's motion to reconsider, the Court finds that Count II is a minor dispute and concerns application of the collective bargaining agreement. Therefore, plaintiff's claim is preempted by the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, and defendant's motion to dismiss was proper. Accordingly, plaintiff's motion to reconsider is denied.

Plaintiff's Motion in Limine

Plaintiff originally filed his motion in limine on January 5, 1999. (Docket entry number 30) This motion was

denied as premature; however, plaintiff was given permission to renew his motion at trial. (Docket entry number 38) On February 1, 2000, plaintiff filed a renewed motion in limine. (Docket entry number 56)

Upon careful review of plaintiff's motion in limine, the Court grants motion in limine numbers 1, 2, 3, 5, and 7. Motion in limine number 4 is denied. Motion in limine #6 is granted except as it may relate to a defense of comparative fault. Motion in limine #8 is granted only with respect to income received from plaintiff's rental properties. Defendant may present evidence that plaintiff performs work on these properties as this evidence addresses the nature and consequences of plaintiff's injuries and his ability to perform work related activities. Motion in limine numbers 9 and 10 are granted with respect to references to the disciplinary hearing held on March 20, 1998. However, defendant may introduce evidence of other injuries suffered by plaintiff that may address plaintiff's inability to perform work related activities.

Defendant's Motion in Limine

In accordance with the Court's scheduling Order, (docket entry number 34), the pretrial motion deadline was August 11, 1999. Although this case was continued at defendant's request, (docket entry number 36), pretrial motions were due by August 11, 1999. Therefore, defendant's motion in limine are untimely and are hereby denied.

Although defendant's motion in limine is denied, the Court now anticipates defendant will move to exclude

plaintiff's expert economist's testimony regarding future lost earnings. Although future earnings calculations should be calculated on a net versus gross basis, *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755 (1979), at trial defendant may counter this testimony by offering evidence relating to the amount of federal income tax liability as well as the Tier I and Tier II taxes. *See Paquett v. Atlanska-Plovidba, Et al.*, 701 F.2d 746, 748-749 (8th Cir. 1983) (absence of income tax consideration in economic expert's opinion testimony could be refuted by defense evidence).

Therefore, plaintiff's motion to reconsider, (docket entry number 58), is denied; plaintiff's motion in limine, (docket entry number 56), is granted in part and denied in part; and defendant's motion in limine, (docket entry number 63), is denied.

IT IS SO ORDERED.

DATED this 24th day of February, 2000.

/s/ John F. Forster, Jr.
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LOWELL BOYD THACKER — Plaintiff

v. 5:96CV00760 JFF

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, d/b/a SOUTHERN PACIFIC TRANSPORTATION COMPANY, — Defendant

MEMORANDUM AND ORDER

(Filed Jan. 24, 2000)

Before the Court is defendant's motion to dismiss Count II of plaintiff's Second Amended Petition. (Docket entry number 47). The background and statement of facts relevant to this motion are contained in the defendant's motion and plaintiff's response and are not in serious dispute. Therefore, they will not be repeated in this opinion except as necessary.

Plaintiff was initially injured at work on July 23, 1992. Plaintiff remained an employee of the defendant-railway and underwent treatment for his injury; however, plaintiff never actually returned to work. On August 13, 1997, plaintiff's employer instructed him to attend a medical examination and drug screening to determine his fitness for duty. Plaintiff failed to attend as instructed and his employer convened an investigative hearing on September 11, 1997. Plaintiff's employer assessed a level 2 disciplinary penalty for failing to attend the examination and screening as instructed.

On February 26, 1998, plaintiff was instructed to provide updated medical documentation regarding his condition. He was instructed to provide this information no later than March 9, 1998, and that failing to comply could result in disciplinary action. (Def.'s ex. D) Plaintiff, upon his oral request, thought he was to be given additional time to provide this information and did not comply with the March 9, 1998, deadline. However, on March 20, 1998, plaintiff's employer held another investigative hearing for his failure to comply with this deadline. From this hearing, plaintiff was assessed a level 5 disciplinary penalty that resulted in his permanent dismissal.

Although these facts are important by way of background information, the instant issue actually revolves around the incident that occurred during the second investigative hearing. At this hearing, plaintiff became nauseated and was injured while moving to the restroom to vomit. The injuries received during this event at the hearing are the basis for damages in plaintiff's Count II.

In Count II of his Second Amended Petition, plaintiff argues that defendant's negligence in failing to provide a safe place to work caused injuries to his neck and back and that defendant's conduct in holding a disciplinary hearing was "extreme and outrageous and done with the intent to cause Plaintiff to suffer severe emotional distress." (Docket entry number 42) Defendant now moves to dismiss this claim maintaining that "Count II should be dismissed for lack of subject matter jurisdiction pursuant to F.R.C.P. 12(b)(1) because the allegations in Count II are preempted by the Railway Labor Act [(RLA)], 45 U.S.C. §§ *et seq.*" (Docket entry number 47)

"Whether a federal law pre-empts a state law establishing a cause of action is a question of congressional intent." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252, 114 S.Ct. 2239, 2243 (1994). "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Id.* "[T]he Act establishes a mandatory arbitral mechanism for 'the prompt and orderly settlement' of two classes of disputes." *Id.* These two classes of disputes have been distinguished in case law as "major disputes" and "minor disputes." *Id.*

Major disputes present the "large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment." *Id.* at 723-724. Disputes concerning "rates of pay, rules of working conditions" are "major" disputes. 45 U.S.C. § 151a. "Major" disputes involve "the formation of collective bargaining agreements or efforts to secure them." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302, 109 S.Ct. 2477, 2480 (1989) (Conrail).

"Minor" disputes, on the other hand, "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a; *see Evans v. Northwest Airlines, Inc.*, 29 F.3d 438, 440 (8th Cir. 1994) (Minor disputes relate to the application of a valid agreement to a specific grievance).

A minor dispute contemplates a situation in which no effort is made to bring about a formal change in the terms of the collective bargaining agreement or to create a new agreement. *Elgin, Joliet & Eastern Ry. V. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290 (1945). A minor disputes relates to the meaning or *proper application* of a particular provision with reference to a specific situation. *Id.*

Minor disputes involve grievances and "affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so." *Id.* at 724.

Because minor disputes are slight in comparison and unlikely to cause "interruption of peaceful relations and of traffic, the [RLA] sets them apart from the major disputes and provides for very different treatment." *Id.* Specifically, "[M]inor disputes are subject to compulsory and binding arbitration before the [National Railroad Adjustment Board] NRAB." *Schiltz v. Burlington Northern R.R.*, 115 F.3d 1407, 1413-1414 (8th Cir. 1997). The RLA therefore preempts state law claims that involve minor disputes because such disputes are subject to mandatory arbitration.[1] "Thus, the critical question is one of

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[1] However, states can provide workers with substantive rights independent of the collective bargaining agreement and causes of action to enforce such rights are not preempted by the RLA. *Norris*, 512 U.S. at 257, 114 S.Ct. at 2246, citing *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, 258, 51 S.Ct. 458, 462 (1931),

characterization – does the state law claim involve interpretation or application of the collective bargaining agreement or, stated another way, is the state law claim independent of the collective bargaining agreement." *Taggart v. Trans World Airways, Inc.*, 40 F.3d 269, 272 (8th Cir. 1994).

Defendant has a " 'relatively light burden' of establishing the exclusive arbitral jurisdiction of the NRAB under the RLA." *Id.* at 1414 (citations omitted). "In fact, there is a presumption that disputes between railroads and their unionized employees are minor, and thus arbitrable. If doubts arise as to the type of dispute at issue, a court should construe the dispute as minor." *Id.* (citations omitted).

Plaintiff urges this Court to find that his dispute is not a "minor dispute under the RLA." (Docket entry number 51) Plaintiff states, "Since this claim does not require the interpretation of the CBA [collective bargaining agreement], the RLA does not preempt Plaintiff's claim." *Id.*

After careful review of plaintiff's claim and defendant's motion to dismiss this claim, the Court finds that plaintiff's claim is a "minor" dispute as it does involve application of the collective bargaining agreement. Therefore, plaintiff's claim is preempted by the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, and defendant's motion to dismiss is proper.

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and *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 324, 92 S.Ct. 1562, 1565 (1972).

Plaintiff states he was "performing his duties responding to and appearing for a disciplinary hearing scheduled by Defendant when he slipped and fell, injuring his neck and back." (Docket entry 42) Plaintiff argues that it was only through the negligence of his employer that he was required to appear at the hearing at all.

Indeed, there is some question about whether or not plaintiff was properly summoned to appear at the investigative hearing. However, at the time of the injury alleged in Count II, plaintiff was still an employee of defendant, St. Louis Southwestern Railway Company. He was also a member of the Brotherhood of Railway Clerks, a union that had a collective bargaining agreement with the employer. Under Revised Rule 23-1 of this collective bargaining agreement, plaintiff's employer must hold investigative hearings before disciplining or dismissing an employee. (Defendant's Exhibit G)

Plaintiff asserts that the issue is not whether defendant can or cannot hold a disciplinary hearing, but whether defendant held the hearing negligently under the circumstances. In other words, plaintiff urges this Court to detach the issue of the justification for the hearing. Plaintiff makes this argument knowing there is no question that the issue involving justification of the hearing would be preempted. Hence, plaintiff asks that the Court focus solely on the issue of negligence surrounding the hearing.

Plaintiff's claim cannot be separated from the issue of justification of the hearing. Plaintiff would have no cause of action but for the defendant's improper convening of

an investigative hearing. Thus, plaintiff's claim of negligence is pendent upon the legitimacy of the investigative hearing. Yet, the legitimacy of the investigative hearing is a matter covered by the collective bargaining agreement. Such a dispute "relates either to the meaning or *proper application* of a particular provision" in the collective bargaining agreement. *Schiltz*, at 1413 (emphasis added).

Plaintiff's dispute also involved alleged negligence regarding the location of the investigative hearing. Plaintiff argues that defendant negligently held the hearing in Pine Bluff and "failed to hold a disciplinary hearing in a location closer to Plaintiff's residence so as to avoid Plaintiff having to travel." (Pl.'s Resp. page 6) Again, the collective bargaining agreement covers the issue of the location of the hearing. Rule 23-3 states, "Whenever possible, investigations shall be held at home station or terminal of employee involved, and at such time as not to cause the employee to lose rest or time whenever possible to do so." (Def.'s exhibit G, page 23) Any alleged negligence under these circumstances still involves the *application* of the collective bargaining agreement and the events surrounding the investigative hearing.

Therefore, plaintiff's dispute is considered "minor" and is subject to binding arbitration before the National Railroad Adjustment Board. *Schiltz* at 1413-1414. Accordingly, plaintiff's Count II of his Second Amended Petition is preempted by the Railway Labor Act and this Court is without subject matter jurisdiction to hear them. *Taggart*, 40 F.3d at 272.

IT IS SO ORDERED.

DATED this 24th day of January, 2000.

/s/ John F. Forster, Jr.
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISON [SIC]

LOWELL BOYD THACKER, Plaintiff,	)	PB-C-96-760
vs.	)	
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, d/b/a SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant.	)	

SECOND AMENDED PETITION

COUNT I – FELA

COMES NOW Plaintiff, LOWELL BOYD THACKER, by and through his undersigned attorneys, and for Count I of his cause of action against Defendant, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY d/b/a SOUTHERN PACIFIC TRANSPORTATION COMPANY, states as follows:

1. This action arises out of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*

2. The Defendant is now and was at all times herein mentioned a Missouri corporation with its primary place of business in the state of California, duly organized and existing according to law engaged in business as a common carrier by railroad in interstate commerce and does business within this Court's geographical jurisdiction.

3. At all times herein mentioned, the Plaintiff was a resident of the state of Arkansas and was employed by the Defendant in interstate commerce.

4. On or about July 23, 1992, Plaintiff was employed as a clerk and was performing the duties of a porter and, while acting in the course and scope of said employment, was injured when he stepped on a bolt which was lying near and around an oily ramp in Defendant's yard in or near Pine Bluff, Arkansas.

5. The aforesaid occurrence and the Plaintiff's hereinafter stated injuries and damages resulted in whole or in part from the Defendant's negligence in one or more of the following respects, to-wit:

(a) The Defendant failed to provide the Plaintiff with a reasonably safe place to work in that Defendant knew or should have known that the ramp had an accumulation of grease and/or oil on it and failed to correct the condition;

(b) The Defendant failed to provide the Plaintiff with a reasonably safe place to work in that Defendant knew or reasonably should have known that the bolt was lying near the ramp and presented a danger to Plaintiff and others working in the area;

(c) The Defendant failed to provide the Plaintiff with reasonably safe conditions for work in that Defendant failed to properly inspect the area where Plaintiff was working.

6. Wholly or partly as a result of the aforesaid negligence of the Defendant, Plaintiff suffered the following

injuries and damages: Plaintiff's right thumb and hand were injured; Plaintiff has been caused to incur and become responsible for certain medical expenses and will incur such expenses in the future; Plaintiff has suffered, does suffer, and will continue to suffer extreme pain and mental anguish; Plaintiff has lost wages and will continue to lose wages in the future from his employment; all to Plaintiff's damages in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

WHEREFORE, Plaintiff LOWELL BOYD THACKER, prays for judgment in his favor and against the Defendant, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY d/b/a SOUTHERN PACIFIC TRANSPORTATION COMPANY, in a fair and reasonable amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00), together with his costs herein expended and for such other and further relief as the Court deems just and proper in these circumstances.

PLAINTIFF DEMANDS TRIAL BY JURY

COUNT II – FELA

COMES NOW Plaintiff, LOWELL BOYD THACKER, by and through his undersigned attorneys, and for Count II of his cause of action against Defendant, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY d/b/a SOUTHERN PACIFIC TRANSPORTATION COMPANY, states as follows:

1. This action arises out of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*

2. The Defendant is now and was at all times herein mentioned duly organized and existing according to law engaged in business as a common carrier by railroad in interstate commerce and does business within this Court's geographical jurisdiction.

3. At all times herein mentioned, the Plaintiff was a resident of the state of Arkansas and was employed by the Defendant in interstate commerce.

4. Cn or about March 20, 1998, Plaintiff was employed as a clerk and was performing his duties by responding to and appearing for a disciplinary hearing scheduled by Defendant when he slipped and fell, injuring his neck and back.

5. The aforesaid occurrence and the Plaintiff's hereinafter stated injuries and damages resulted in whole or in part from the Defendant's negligence in one or more of the following respects, to-wit:

(a) The Defendant failed to provide the Plaintiff with a reasonably safe place to work in that Defendant had been warned by Plaintiff's physicians that Plaintiff should never again set foot on railroad property because of Plaintiff's physical condition;

(b) The Defendant failed to provide the Plaintiff with a reasonably safe place to work in that Defendant knew or reasonably should have known that being on railroad property presented a danger to Plaintiff;

(c) The Defendant failed to provide the Plaintiff with reasonably safe conditions for work in that Defendant failed to hold the disciplinary hearing in a location closer to

Plaintiff's residence so as to avoid Plaintiff having to travel.

6. Furthermore, Defendant's conduct in holding the disciplinary hearing was extreme and outrageous and done with the intent to cause Plaintiff to suffer severe emotional distress.

7. Wholly or partly as a result of the aforesaid negligence of the Defendant, Plaintiff suffered the following injuries and damages: Plaintiff's neck and back were injured; Plaintiff has been caused to incur and become responsible for certain medical expenses and will incur such expenses in the future; Plaintiff has suffered, does suffer, and will continue to suffer extreme pain and mental anguish; Plaintiff has lost wages and will continue to lose wages in the future from his employment; all to Plaintiff's damages in an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

WHEREFORE, Plaintiff LOWELL BOYD THACKER, prays for judgment in his favor and against the Defendant, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY d/b/a SOUTHERN PACIFIC TRANSPORTATION COMPANY, in a fair and reasonable amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00), together with his costs herein expended and for such other and further relief as the Court deems just and proper in these circumstances.

PLAINTIFF DEMANDS TRIAL BY JURY

Respectfully submitted,

THE LAKIN LAW FIRM

By _____

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App. 30

AGREEMENT

Between

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

and

ALL THAT CLASS OF CLERKS AND OTHER OFFICE, STATION AND STOREHOUSE EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES.

Effective January 1, 1972

* * *

"23-1. Investigation: An employee who has been in the service more than sixty (60) days or whose application has been approved shall not be disciplined or dismissed without investigation at which investigation he may be represented by one or more duly accredited representatives. He may, however, be held out of service pending such investigation. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. At a reasonable time prior to the investigation the employee shall be apprised in writing of the precise charge against him; however, no charge shall be made that involves any matter of which the Carrier has had actual knowledge thirty (30) days or more. A decision will be rendered within ten (10) days after the completion of investigation.

23-2. Appeals and Further Hearing: The right of appeal by employees or their duly accredited representatives in the regular order of succession up to and including the highest official designated by the Carrier to whom appeals may be made is hereby established. When appeal is taken, further hearing shall be granted, if requested, of the official to whom appeal is made. Appeal will be registered within fifteen (15) days after decision is given and a copy furnished official whose decision is appealed. Hearing on appeal will be given within fifteen (15) days and decision on appeal will be given within ten (10) days thereafter.

23-3. Investigation When Held: Whenever possible, investigations shall be held at home station or terminal of employee involved, and at such time as not to cause the employee to lose rest or time whenever possible to do so. Employee shall have reasonable opportunity to secure the presence of duly accredited representatives and necessary witnesses.

23-4. Record of Investigations and Hearings: A copy of statements made a matter of record at the investigation or on appeals will be furnished the employee and his representative. A copy of each statement so recorded will be signed by the person making same. When a notation is made against the record of an employee he will be furnished a copy and will receipt for same.

23-5. Exoneration: If the final decision decrees that charges against the employee were not sustained, the record shall be cleared of the charges; if suspended or dismissed, the employee shall be reinstated and compensated for wage loss, if any, suffered. If loss is due to

failure to assign to higher rated bulletined position, employee shall be reimbursed for the amount of the difference in rates of pay.

23-6. Date of Suspension: If an employee is suspended, the suspension shall date from the time he was taken out of the service.

23-7. Unjust Treatment: An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above if written request is made to his immediate superior within fifteen (15) days of the cause for complaint.

23-8. Time Limit: The time limits provided in this rule may be extended by mutual agreement.

Railway Labor Act 45 U.S.C. §153

§153. General Provisions.

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided –

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall

prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly

qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard- service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler

helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: Provided further, however, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute

arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order

of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on

which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in

carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice- chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by

this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with

the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was

made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so

selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible [FN1] by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.